KHOO CHENG TAT v. LIM SOON TEIK & ANOR.; B.M. KAMDAR, INTERVENING

[O.C.J. (Raja Abdul Aziz Addruse J.C.) March 24, August 5, October 14, November 18, 19, 1980 & May 25, 1981]
[Penang — Originating Summons No. 589 of 1978]

Administration of Estates — Sale and purchase of lands — Consent by beneficiaries — Order granted by Court — Application to amend.

Practice and Procedure — Order of Court — Application to amend — Principles applicable. R.S.C. 1957, O. 28 r. 12.

The applicant sought to amend an order of court granted on October 6, 1978 which allowed the respondents as administrators of the estate of one C to sell certain lands and hereditaments at the price of $1,458,616 and not less. The said order also cited the applicant and one Lee as representatives of the estate. When granting the order, the court had before it the consents of all the beneficiaries including that of the applicant. The court was also given the valuation report showing that the market value of the lands as at August 1977 was $1,458,616 or $1 per sq. ft.

The respondents forwarded to the applicant for his approval a draft agreement of sale of the lands. The draft agreement named the purchaser of the lands as one Kamdar.

The applicant also applied *ex parte* for the interim injunction to restrain the respondents from selling the land. The said injunction was granted on December 27, 1978.

The applicant subsequently abandoned the amendments. Instead, he sought to so vary the order and proposed *inter alia*, that the lands be sold by public tender at a minimum price of $2,188,040.58, being their market value as of May, 1979, assessed by an independent valuer, and that the applicant's solicitors be given the conduct of the sale of the lands.

The purchaser applied and was on March 24, 1980, granted leave to intervene.

A number of the beneficiaries who had previously filed their consent to the making of the order had since withdrawn their consents. They preferred to support the applicant's proposal to have the property sold by public tender at the increased price.

Held, dismissing the application: (1) no court or judge has power to alter or vary such order either in an application in the original action or matter, or in a fresh action brought to review it. The object of such a rule is to ensure that those who are affected by the order can with certainty conduct themselves in relation to that order; the court, however has power to correct any clerical mistakes caused by accidental slips or omissions, and to vary the order for the purpose of giving effect to its meaning and intention;

(2) a binding contract was created between the intervener and the respondents as soon as the intervener exercised his option to purchase; the interlocutory injunction was consequently dissolved;

(3) the applicant had held up the completion of the sale and had caused the beneficiaries to the estate to wait unnecessarily for their share of the proceeds of sale. Costs awarded to the respondents should therefore be paid personally by the applicant.

Cases referred to:-

(1) *Re Swire, Mellor* v. *Swire* 30 Ch. D. 239, 249.
(2) *Thynne* v. *Thynne* [1955] P. 272, 313.
(3) *Cozens* v. *North Devon Hospital Management Committee* [1966] 2 All E.R. 799, 806.
(4) *Che Ah & Che Yang Kelsom* v. *Che Ahmad* [1941] M.L.J. 126, 127.
(5) *Ng Lit Cheng* v. *Felixia Varna Kulasinghe* [1977] 2 M.L.J. 249, 253.

ORIGINATING SUMMONS.

Tan Phock Kin for the applicant.

R.R. Chelliah (*R.K. Sharma* with him) for the respondents.

V.C. George (*Miss R. Kumarasamy* with him) for the intervener.

Cur. Adv. Vult.

Raja Abdul Aziz Addruse J.C.: I had, at the hearing of this application dismissed it, giving in brief my reasons for doing so but indicating that I would subsequently furnish my full grounds of judgment.

This is an application to amend an order of this court given by Arulanandom J. on October 6, 1978 in Originating Summons No. 436 of 1978, by which:—

(a) the respondents as the administrators of the estate of Cheah Bun Kwa, deceased, were granted leave to sell the lands and hereditaments held under Pegangan No. 1543 and Pegangan No. 1544 Pechahan Bandar 5, Daerah Timor Laut, Pulau Pinang, at the price of $1,458,616 (equivalent to $1 per sq. ft.);

(b) the respondents were to be at liberty and empowered to "enter into an agreement of sale with the purchaser subject to such terms as they may deem fit provided that the sale price of the lands be not less than $1,458,616"; and

(c) the applicant and one Lee Guan Chia were appointed under Order 16 rule 46 of the Rules of the Supreme Court, 1957, to represent the estate of 17 named deceased persons and/or all persons claiming beneficial interest in the estate, whether directly or through the estate of any deceased beneficiary, for all the purposes of the orders sought by the originating summons in question.

The order was subsequently drawn.

When granting the order, the court had before it the consents of all the known beneficiaries of the estate of the said Cheah Bun Kwa, deceased, as well as a valuation report showing that the market value of the lands as at August, 1977 was $1,458,616 or $1 per sq. ft. Among those consenting to the making of the order was the applicant who initially filed his consent as a beneficiary of the estate and, after his and Lee Guan Chia's appointment referred to above, filed another consent in a represetative capacity.

The respondents forwarded to the applicant for his approval a draft agreement of sale of the lands. The draft agreement named as the purchaser of the lands one Balwantrai M. Kamdar s/o Maganlal who had agreed to purchase the lands. It is not stated anywhere in the affidavits as to when this draft was sent to the applicant but it is clear from the applicant's affidavit affirmed on December 16, 1978, that he had received the draft before that date.

On December 22, 1978, the applicant filed the present originating summons to amend the order. By a summons-in-chambers of the same date and filed in these proceedings, the applicant applied *ex parte* for an interim injunction to restrain the respondents, their servants or agents from selling or otherwise disposing of the lands; and the injunction was granted by this court on December 27, 1978.

The amendments to the order as originally applied for, if allowed, would have the following effect:—

(a) the sale price of $1,458,616 was to be "subject to present tenancies"; and

(b) the terms of the agreement of sale must be approved by the applicant and Lee Guan Chia, in their capacity as representatives appointed by the order, as hereinbefore mentioned.

The applicant's reasons for requiring the order to be so amended were that the Valuation Report stated that the market value of the lands as assessed was "with the existing tenancies", and that the amendments were necessary for protecting the interest of the beneficiaries.

The issue raised was simple enough and would have remained so had not the applicant subsequently abandoned the amendments and sought to so vary the order as to virtually withdraw from the respondents the leave granted to them to sell the lands at $1,458,616 and to enter into the agreement of sale. By his affidavit affirmed on October 25, 1979, the applicant proposed *inter alia* that the lands be sold by public tender at a minimum price of $2,188,040.58, being their market value as of May, 1979, assessed by an independent valuer, and that the applicant's solicitors be given the conduct of the sale of the lands.

Perturbed by this latest turn of events, Balwantrai M. Kamdar s/o Maganlal, the purchaser, applied to this court for, and was on March 24, 1980, granted leave to intervene as a party to these proceedings. The intervener's application for certain other orders was not heard on March 24, 1980, but was adjourned to be heard with the present application.

Influenced no doubt by the prospect of obtaining a better price for the lands, a number of the beneficiaries who had previously filed their consents to the making of the order had since withdrawn their consents: they preferred to support the applicant's latest proposal to have the property sold by public tender at the increased price.

The questions to be decided were firstly, whether the application to amend should be allowed at all and, secondly, if it should be allowed, in what manner the order should be amended.

The general rule with regard to amendment of any order which has been drawn up is that no court or judge has power to alter or vary such order either in an application in the original action or matter, or in a fresh action brought to review it. The object of such a rule is to ensure that those who are affected by the order can with certainty conduct themselves in relation to that order. There must however, be certain exceptions to this general rule if injustice is to be avoided; and it has long been accepted that the court has power to correct any clerical mistake caused by accidental slips or omissions, and to vary the order for the purpose of giving effect to its meaning and intention: see in *Re Swire Mellor* v. *Swire.*[1] In *Thynne* v. *Thynne,*[2] Morris L.J. in considering the powers of court to make amendments in the terms of its orders and judgments said: "In addition to powers resulting from rules of court, it is clear that there are necessary powers which are inherent in the jurisdiction of the court". In that case, Morris L.J. gave a few instances in which the court could vary or alter its orders or judgments. For other instances, see the Commentary to Order 20 rule 11 in the Annual Practice, 1979. In order to succeed in his application to amend the Order, the applicant must show that one of the exceptions applied.

The submission of counsel for the applicant in regard to the first question, namely, whether the application to amend should be allowed, was based on two main propositions. Firstly, it was said that the Order was an *ex parte* order and should be varied on the ground of non-disclosure of material facts. It was contended for the applicant that the respondent, when applying for the order ought to have informed this court that the purchaser of the lands was Balwantrai M. Kamdar s/o Maganlal, that the value of the lands at $1,458,616 (or $1 per sq. ft.), as assessed by the valuers, was with existing tenancies, and that the valuation report was prepared in August, 1977, which was well before the date of the respondent's application.

With respect, I cannot agree with counsel in his contention that the Order was an *ex parte* order. It is true that the respondent's application for the order did not name any person upon whom service of the Originating Summons No. 436 of 1978 was to be effected and that the order mentions the respondent's application as having been "made *ex parte*", but these facts by themselves cannot conclusively determine that the order is an *ex parte* order. The substance rather than the form should be looked at; and the circumstances in which the application was made and the order given show that the beneficiaries to the estate had notice of the respondent's application and all of them (including the applicant) consented to the order being made. Indeed, the applicant and Lee Guan Chia were specially appointed by the order as representatives for the purpose of protecting the interest of certain persons named in the order; and in that representative capacity the applicant filed another consent to the making of the order, after the order was made. Any of the beneficiaries, the applicant or Lee Guan Chia could, if they had any reason so to do, have objected to the Order being made. *Jowitt's* Judicial Dictionary of English Law (2nd Edn.) at page 773 defines the term *"ex parte"*, as applied to an injunction, to mean an injunction which is granted without the opposite party having had notice of the application, and in *Cozens* v. *North Devon Hospital Management Committee*[3] Salmon L.J. distinguished an application made *ex parte* from one made on notice.

Even assuming that the Order was made *ex parte* I find that there was a full disclosure of material facts made by the respondents in their application. Although the identity of "the Purchaser" is not ascertainable from a mere reading of the Order, it is evident from the respondents' affidavit filed in support of the application for the Order, that the purchaser was to be the Intervener. It is also evident that this court was aware at the time it made the Order that the valuers' assessment of the market value of the lands was made in August, 1977 and that the market value as assessed was "with the existing tenancies" — the Valuers' Report dated August 15, 1977 was exhibited to the respondents' affidavit mentioned. This application, insofar as it is based on the ground of non-disclosure of material facts by the respondents, must, therefore, fail.

In spite of the respondents' full disclosure of the facts already referred to, the applicant would, in my view, have been entitled to have the Order amended in the terms of one of his original proposals, that is to say, that the sale price be expressed to be with existing or present tenancies, if the applicant could satisfy the court that there were, in fact, existing tenancies on the lands at the time the Order was made. Obviously, if there were such tenancies, it would be necessary for the amendment to be made in order to protect the estate against any possible claim the purchaser might make for reduction of the purchase price: the price of the lands must surely be lower with the existing tenancies than without them, and in the event of such reduction, the beneficiaries would not be receiving their shares of the sale price as approved by the Order but of something less. But were there existing tenancies?

From the applicant's affidavit filed with this application, the applicant's only basis for alleging that there were existing tenancies on the lands was the valuer's statement in their report that the market value of the lands was assessed "with the existing tenancies". The respondents, in opposing the application, stated in their separate affidavits in reply that there were no tenants on the lands but only squatters, and that this fact was known to all the beneficiaries, including the applicant. Lee Guan Chia, the other person appoint by the Order to represent the estate of the 17 deceased persons, also opposed the application and confirmed that there were no tenants on the lands but only squatters. In a letter dated December 29, 1978, and in an affidavit affirmed on March 17, 1980, the valuers clarified that the expression "existing tenancies" in their report was erroneously used and should have, in fact, been "existing squatters". Looking at the valuers' report as a whole, I have no doubt that the word "tenancies" was typed in error, as explained by the valuers, and I accept the assertions of the respondents and Lee Guan Chia, made categorically in their affidavits, that there were no existing tenancies. Accordingly, the application to amend the Order on this ground must also fail. I should observe that the applicant has nowhere in his affidavits stated positively that to his knowledge there were existing tenancies to which the lands were subject. So far as he was concerned, the words "tenancies" and "squatters" had different meanings, and since the valuers had used the expression "existing tenancies", their explanation that there had been a typing error should be disregarded. In my view, the question as to whether there were or were not tenancies on the lands at the date of the making of the Order is a simple question of fact and it seems to me that this fact could have been easily ascertained by the applicant and, if there were existing tenants, should have been deposed to positively in his affidavits.

In regard to the second proposition, it was submitted for the applicant that the Order was not effective in creating a binding contract between the respondents and the Intervener, since there was then no agreement of sale in existence which could be said to have been approved by the court. I was referred to *Che Ah and Che Yang Kelsom* v. *Che Ahmad*[4] where Terrell J. said: —

> "A purchaser under these conditions is perfectly well aware that his contract has to be approved by the court before it can be carried into effect, and he takes the risk of losing his bargain if a better offer is obtained before the approval of the court is given, or of being held to his bargain if, for any reason, there has been a fall in the value of the land between the date of his offer and the date of the order confirming the contract".

and to *Ng Lit Cheng* v. *Felixia Varna Kulasinghe*[5] where Gill C.J. said:—

> "There must be a clear distinction between the position of a potential purchaser from the estate of an intestate deceased whose contract can only be conditional until the court approves the sale and the position of a purchaser whose contract has already been confirmed by a court order."

The facts, insofar as they are relevant, show that on November 3, 1977, an option, exercisable within six months, was granted by the respondents to one Simon Barnabas, to sell the lands to the intervener. In the event that the sale to the intervener could not be concluded within the option period, Simon Barnabas was entitled, by giving notice, to have the option period extended for a further six months. On the same date that he obtained the option, Simon Barnabas granted to the intervener a sub-option to purchase the lands. When the purchase by the intervener was not concluded during the initial period of six months, Simon Barnabas gave the respondents the requisite notice thereby extending the period of the option to November 2, 1978.

During this extended period, Simon Barnabas exercised his option, and it was this that led to the respondents' application for the order. The intervener himself did not formally exercise his sub-option to purchase until October 31, 1978, when his solicitors wrote to the respondents' solicitors.

Counsel for the applicant submitted that since the intervener did not intimate his intention to purchase the lands until after the order was made, it was necessary for the respondents to have made another application to this court for leave to sell the lands to the intervener and for the terms of the sale agreement to be approved. Having regard to the terms of the order which had given to the respondents leave to sell the lands to the intervener, I cannot accept this contention. It is to be noted that in their joint affidavit filed in support of their application for the order, the respondents had disclosed the full facts of the option and the sale to the intervener, and this court as well as beneficiaries to the estate (including the applicant) were fully aware of the intention of the respondents to sell the lands to the intervener at the approved price, as soon as the leave was obtained.

As for the terms of the agreement of sale, though it was specified in the order that they were to be such as the respondents deemed fit, condition 9 of the option had, in fact, defined what they were to be: the lands were to be purchased "upon the terms herein (in the option) contained and no further". In any event, I find it significant that the applicant has not in any of his affidavits made any complaint with respect to the terms of the sale as set out in the draft agreement of sale which was forwarded to him after the order was made, save only with regard to the matter of the sale not being expressed to be subject "to existing tenancies."

The case of *Che Ah and Che Yang Kelsom* v. *Che Ahmad, supra,* can, in my view, be easily distinguished on the facts, in that there the court had not given its permission to the administrators to sell the lands when the higher purchase offer was made, and the Court of Appeal, holding that it was the duty of the court to protect the rights of the parties who had an interest in the land, preferred the higher price. In this case, leave to sell the lands to the intervener had been given to the respondents by the order. This was followed very soon afterwards by the intervener's exercising his sub-option. Whether in exercising his sub-option the intervener should have given his notice to Simon Barnabas rather than to the respondents' solicitors was never raised in argument and is, in my view, in any case unimportant. What is important is that both the respondents and the intervener, in reliance of the terms of the order, subsequently reached agreement regarding the purchase of the lands and in accordance with the terms of the option granted by the respondents to Simon Barnabas, the intervener had paid to the respondents by way of deposit and part payment ten per cent of the purchase price. I am of the view that in the circumstances of this case, a binding contract was created between the intervener and the respondents, as soon as the intervener exercised his option to purchase.

The argument of counsel for the applicant, that the intervener by not coming to this court sooner to assert his rights under the contract has forfeited his right to purchase the lands, is not tenable: it is clear the interlocutory injunction which the applicant had obtained restrained the respondents from disposing of the lands to the intervener.

For the above reasons the applicant also fails on his second ground.

For the above reasons, I dismissed the application with costs to the respondents. By way of consequential order, I also dissolved the interlocutory injunction with costs to the respondents with a direction that any damages suffered by the estate arising out of the granting of the injunction be assessed by the Senior Assistant Registrar and be paid to the estate by the applicant.

As previously observed, the presence of existing tenants on the lands at the date of the making of the order was a factual issue easily ascertainable by the applicant from either the respondents themselves or the valuers. Both the respondents and the valuers positively denied that there was any tenant on the lands. As for the sale price of the lands, the respondents had fixed the purchase price specified in their application for the order on the strength of the valuer's report. The applicant has not said that this was an unreasonable valuation but merely contended that the value of the lands had since increased. That the price of the lands was reasonable was subsequently confirmed by another firm of valuers, C.H. Williams Talhar & Wong Sdn. Bhd., who assessed the value of the lands at 84 cents p.s.f. as at November 3, 1977 and at 90 cents p.s.f. as at November 3, 1978. In the light of this I considered the applicant's conduct in pursuing this application to be unreasonable. The applicant had held up completion of the sale and had caused the beneficiaries to the estate to wait unnecessarily for their share of the proceeds of sale. In my view the costs awarded to the respondents should be paid personally by the applicant, and I so ordered.

On the view I had taken of the application, the question as to the manner in which the order should be amended became irrelevant.

Order accordingly.

Solicitors: *Thillaimuthu & Phock Kin; Sharma & Co.; Ng Ek Teong & Partners.*

S.M. APPADURAY & ANOR. v. R. ANANDA & ANOR.

[O.C.J. (George J.) June 8, 1981]
[Kuantan — Civil Suit No. 203 of 1980]

Practice & Procedure — Order 14 application — Boundary dispute — Expert evidence required — Triable issues — Application for summary judgment disallowed.

Evidence — Expert evidence — Boundary dispute.

The plaintiffs were the registered proprietors of a lot of land which has a common boundary with that of the lot of land belonging to the defendants. The dispute between the said parties concerned what and where in fact was the common boundary. The first defendant contended that the brick wall between the houses on each of the lots was the common boundary while the plaintiffs contended that the wall had encroached onto the plaintiffs' lot to the extent of 513 sq. ft. of the plaintiffs land and that that occupation was unlawful. The plaintiffs relied, *inter alia,* on the affidavit of a surveyor regarding the said encroachment. The defendants questioned the correctness of the survey made by the plaintiffs' surveyor.

The plaintiffs applied for judgment under Order 14 of the Rules of the High Court 1980.

Held, dismissing the plaintiffs' application: (1) the challenge to the accuracy of the survey created a triable issue as to the positioning of the boundaries of the two lots;

(2) the court was not in a position to form an opinion of the boundaries without the surveyor explaining why the court should adopt his findings.

CIVIL SUIT.

Lim Kean Chye (*Peter Lai* with him) for the plaintiffs.

C.V. Dass for the defendants.

Cur. Adv. Vult.

George J.: When this application under Order 14 of the Rules of High Court came up for hearing I had not only the affidavits filed on behalf of the parties but also the pleadings of both the parties before me.

The plaintiffs are the registered proprietors of a lot of land in the town of Kuantan (Lot No. 9280) which lot has a common boundary with that of the lot of land (Lot No. 9281) the registered proprietors of which are the defendants.

The quarrel between the parties is as to what and where in fact is the common boundary. The 1st named defendant (who had taken over the interest of the 2nd named defendant) contends that the brick wall between the houses on each of the lots is the common boundary while the plaintiffs contend that that wall has encroached onto the plaintiffs' lot to the extent that the 1st named defendant is in occupation of some 513